Strasbourg, 16 October 2012

CDL(2012)074
Engl. only

Opinion 672/2012

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

BY THE GOVERNMENT OF HUNGARY

ON THE DRAFT OPINION OF THE VENICE COMMISSION ON ACT CXII OF 2011 ON INFORMATIONAL SELF-DETERMINATION AND FREEDOM OF INFORMATION OF HUNGARY

Hungary has received the draft opinion Nr. 672/2012 (hereinafter referred to as "draft opinion") of the European Commission for Democracy Through Law (Venice Commission) on Act CXII of 2011 on informational self-determination and freedom of information (hereinafter referred to as "the Act").

Hungary welcomes the result of the general assessment of the Act stated in para. 82 of the draft opinion: "The Hungarian law on self-determination and freedom of information (Act CXII/2011, as of 1 June 2012) may be considered, as a whole, as complying with the applicable European and international standards".

However, as Hungary recognised that several comments aimed at the "improvements" of the Act provided by the draft opinion might be based on insufficient information of the Hungarian legal order and the Act itself, Hungary wishes to draw the attention to the following facts and comment on certain points of the draft opinion.

Ad III. European and International Standards

The draft opinion lists all the international legal instruments that may be relevant in relation to the subject matter of the Act. Hungary wishes to highlight that all the listed conventions are ratified by Hungary and promulgated duly in the Hungarian legal system,1 that clearly indicates Hungary's commitment to promote fundamental rights and freedoms in Hungary, especially the protection of personal data and the freedom of information – right of access to information.

This is more important to note with regard to the Council of Europe Convention on Access to Official Documents (hereinafter referred to as "the Convention 205" that was signed and ratified by Hungary at its very inception. Sadly this instrument still not constitutes any legal obligation since the condition to the entry into force of the Convention 205 – the ratification of at least ten states – has not yet been fulfilled.

Hungary therefore is surprised that the comments made with regard to the Act are based partly on an international legal instrument that has no legal effects yet and that has not been ratified by the majority of the Member States of the Council of Europe – and of the European Union – including inter alia Germany, France and the United Kingdom.
Nevertheless in line with the above-mentioned commitment to transparency, Hungary finds it indispensable to comply with the – not yet effective – obligations stemming from the Convention 205, and thus wishes to present its comments also on the suggestions of the draft opinion based on this instrument.

Ad IV. Issues under review

A. The scope of the Act

From the fact that the Act regulates the protection of personal data and the right of access to information in a single instrument and these rights are supervised by the same authority the draft opinion draws the conclusion that "[t]his may in some cases give rise to interpretation and application problems and lead to a reduced level of protection of the rights at issue".

Hungary regrets that the assessment of the scope of the Act is rather one-sided, it does not even endeavour to mention any arguments in favour of the one-instrument-one-institution

[1] European Convention on Human Rights: Act XXXI of 1993, International Covenant on Civil and Political Rights: Act: Decree-Law 8 of 1976, Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data: Act VI of 1998, Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows: Act LIII of 2005, Council of Europe Convention on Access to Official Documents: Act CXXXI of 2009.

model that was chosen by the Hungarian legislator, although even the draft opinion admits that this model is not unique in Europe.

Moreover, the above cited conclusion stated at the end of para. 15. is rather harshly formulated and quite peculiar since it is not supported by any evidence or known cases based on the case-law of either the European Court of Human Rights or Hungarian courts or supervisory authorities or any other supervisory authority of a state where similar model of the protection of the rights of issue prevails.

It is worth mentioning that the one-instrument-one-institution model is part of the legal tradition in Hungary, the very first act dealing with these fundamental rights adopted in 1992 and in force until 2011 was also based on this concept.

Experience has shown that this model works properly and shall be maintained in the future. A single institution has the ability to strike the right balance between the protection of personal data and the right to access to public information in cases where these rights are concurring with each other. From this it follows naturally and logically that all the competences of the institutions responsible for the promotion of the mentioned rights are enshrined in the same legal instrument. This without any doubt contributes to legal certainty and thus – right on the contrary of the conclusion stated in the draft opinion – a greater level of protection of both fundamental rights can be achieved.

B. The National Authority for Data Protection and Freedom of Information

The draft opinion deals with the standards and regulation of independence with regard to the supervisory authority in details. Para. 25. states that "[i]t is obvious that the designation made by the executive exclusively, which still prevails in some countries (including Estonia, Ireland, Latvia, Luxembourg, Netherlands and Sweden), offers fewer guarantees of independence than the designation by Parliament".

Furthermore para. 83. of the draft opinion draws the following conclusion:

"The mode of designation of the President of the National Authority for Data Protection and Freedom of Information does not offer sufficient guarantees of independence, as the executive, which is the main stakeholder controlled, has the leading and exclusive role in the nomination process."

With regards the above mentioned findings, Hungary wishes to express its disappointment stemming from the following reasons.

Firstly, as para. 20. and 21. of the draft opinion refers to the judgement C-518/07 of the Court of Justice of the European Union2 and the draft General Regulation on the protection of personal data3 as European standards, Hungary wishes to remind the Venice Commission that both mentioned legal instrument expressly contains the possibility to appoint the supervisory authority by the executive power.

In its judgement the Court of Justice of the European Union ruled:4

"Admittedly, the absence of any parliamentary influence over those authorities is inconceivable. However, it should be pointed out that Directive 95/46 in no way makes such an absence of any parliamentary influence obligatory for the Member States.

[2] Case C-518/07 Commission v Germany ECR I-1885, Judgment of 9 March 2010.
[3] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25.1.2012, COM(2012) 11 final.
[4] Para. 43. and 44.

Thus, first, the management of the supervisory authorities may be appointed by the parliament or the government. Secondly, the legislator may define the powers of those authorities."

Hungary strongly believes that the Act is fully in line with these obligations.

Furthermore Article 48 (1) of the draft general data protection regulation reads as follows:

„Member States shall provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned."
Since the draft general data protection regulation is presently undergoing negotiation in the framework of the decision-making process of the European Union, if, according to the Venice Commission, the cited provision of the draft regulation dealing with the appointment of the supervisory authority runs counter to the standards of the Council of Europe, Hungary encourages the Venice Commission to indicate this shortcoming to the decision-making institutions of the EU without delay in order to prevent inconsistency of the future EU data protection legislation with the applicable Council of Europe norms.

Secondly, Hungary would like to draw the attention to the fact that the President of the Republic in the Hungarian constitutional system does not form part of the executive power. Hence, Hungary disagrees wiht the assumption "the executive, […] has the leading and exclusive role in the nomination process" on which the conclusion of the draft opinion is based.

The Fundamental Law of Hungary clearly defines the competences of the President who acts as an independent branch of power. Amongst these one can truly find certain competences that, in case of their application, are needed to be countersigned by a member of the Government, i.e. the executive power5.

Nevertheless this is not the case relating to the nomination process of the President of the National Authority for Data Protection and Freedom of Information. It seems that the draft opinion might have overlooked Art. 45 (8) of the Act, which reads as follows:

"Decisions assigned to the competence of the President of the Republic by paragraphs (3) and (6) and by Article 40 need not be countersigned."6

This provision provides for the President of the Republic the same power to appoint the President of the National Authority for Data Protection and Freedom of Information as it is provided for by the Fundamental Law of Hungary with regard the appointment of professional judges.7

Based on the above mentioned arguments Hungary is convinced that the designation process of the President of the National Authority for Data Protection and Freedom of Information is fully in line with the applicable European standards and does not in any way infringes the independency of the President of the National Authority for Data Protection and Freedom of Information.

In addition Hungary would like emphasize that all the elements of independence referred to in para. 17. of the draft opinion are granted in the Act accordingly. Hence the National Authority for Data Protection and Freedom of Information is free to act without any influence that may endanger its independence.

[5] These competences are enshrined in Art. 9 (4) of the Fundamental Law of Hungary.
[6] Art. 40 of the Act regulates the designation process of the President of the National Authority for Data Protection and Freedom of Information.
[7] See point k) of Art. 9 (3) and Art. 9 (5) of the Fundamental Law of Hungary.

Ad para. 39.
Hungary recognises that para. 39. of the draft opinion calls for an explanation regarding Art. 38 (4) of the Act, that provides the President of the National Authority for Data Protection and Freedom of Information with the right to submit legislative proposals.

According to Art. 6 (1) of the Fundamental Law of Hungary "[t]he President of the Republic, the Government, any parliamentary committee and Member of Parliament may propose bills".

The President of the National Authority for Data Protection and Freedom of Information is therefore not entitled to submit bills directly to the Parliament, however the Act provides for a plenty of options to channel in his/her legislative proposals.

Point a) of Art. 38 (4) contains the general competence of the President of the Authority to "put forward proposals for the adoption or amendment of rules of law affecting the control of personal data or affecting access to data of public interest or to data public on grounds of public interest, and […] give an opinion on the draft rules of law affecting its tasks".

In practice according to this provision the President of the Authority shall be involved in all legislative process of draft instruments that relate to his/her competences and shall be requested to give an opinion on these drafts.

On the other hand the President of the Authority may at his/her own discretion initiate the adoption or amendment of any legislative acts not only at the body that is responsible for the drafting of these norms (e.g. the Government) but also at institutions that are entitled to submit proposals to the legislator (e.g. any parliamentary committee, Member of Parliament or the President of the Republic) and even at the legislator as well.

This latter competence is reflected in the Act by the following provisions:

Art. 45/A:
"The President of the Authority shall have the right to participate and speak at the meetings of the Parliament's committees".

At the meetings of the Parliaments's committees the President is entitled to put forward proposals for amendments or adoption of acts.

Art. 57:
"Should, pursuant to the investigation, the Authority establish that the violation of rights or its immediate threat ensues from an unnecessary, ambiguous or inappropriate provision of legislation or regulatory instrument of public law, or the lack or deficient nature of the legal regulation of data control issues, the Authority may make recommendations to the body authorised to legislate or issue regulatory instruments of public law, as well as to the drafter of legislation to prevent the future occurrence of the violation of rights or its immediate threat. The Authority may recommend the amendment, repeal or drafting of legislation or the regulatory instrument of public law. The body contacted shall notify the Authority of their position, as well as of measures taken in accordance with the recommendation within a period of sixty days".

This provision not only provides the President of the Authority with the opportunity to make a recommendation to improve legislative acts but also obliges the body contacted to respond to these recommendations.

Point b) of Art. 38 (4):
According to this provision the President of the Authority "shall publish an annual report on its activities by 31 March of every calendar year and submit the report to Parliament".

Apart from the competences previously mentioned this provision allows the President of the Authority to propose in his/her report adoption or amendments of acts directly to the Parliament.

Based on the above, Hungary strongly believes that according to the provisions currently in force the President of the Authority is very well equipped with various means to channel in his/her proposals to adopt or amend legislation falling into his/her competences.

Ad para. 40.
According to the draft opinion the "Venice Commission finds regrettable that the Act does not explicitly indicate […] whether the Authority's President, who exercises the "employer's rights over the civil servants and employees of the Authority" may freely recruit the Authority's staff".

Hungary is of the opinion that Art. 50 of the Act is a clear-cut provision, it explicitly and exclusively entitles the President of the Authority to "freely recruit the Authority's staff". The phrase "employer's rights" is a fixed legal term in the Hungarian legal system, especially in the field of labour law. This term encompasses the totality of rights that an employer may exercise in relation to an employee, including naturally and logically the recruitment of the staff.
Moreover in Hungary's view if the Hungarian legislator had decided to entitle any other body or person to interfere with the "right to free recruitment" of the President of the Authority it would have adopted a provision explicitly providing for this right.

To sum it up, due to a lack of a provision entitling any other person or body than the President of the Authority to recruit the staff of the Authority, the inclusion of the provisions in the Act that guarantee full independency to the President, and the explicit provision providing with the President the exercise of "employer's rights" the cited opinion of the Venice Commission seems rather unjustified.

C. The protection of personal data

Ad para. 41.
According to para. 41. of the draft opinion the Venice Commission "regrets […] that the Hungarian legislature has not assigned the supervisory body the power to directly resolve disputes; classical judicial means proved, in countries where these are available, an obstacle to a rapid and efficient implementation of the rights arising from legislation on data protection, as individuals are reluctant to engage in lengthy and inconclusive legal proceedings".
Hungary wishes to indicate that the concerns of the Venice Commission seem to be unfounded as the Act provides the data subjects with an option to seek an effective legal remedy by the Authority.

As a result of a request of an investigation the Act regulates various legal consequences that may be freely applied by the Authority taking into due account of the gravity of the alleged violation or immediate threat of the right to the protection of personal data.
Both the ombudsman-type investigation procedure and the administrative data protection procedure and the sanctions connected thereto are highly appropriate to resolve disputes between the data controllers and the data subjects effectively without requiring the data subjects to engage in "lengthy and inconclusive legal proceedings".

The most relevant provisions in this respect of the Act are the following:

Art. 52 (1):
"Anyone is entitled to request an investigation from the Authority, on the grounds of violation of rights relating to the control of personal data, access to data of public interest or data public on grounds of public interest, or in the event of immediate threat of the above."

Art. 55:
"(1) Within two months8 of the receipt of the submission, the Authority shall act as follows:
a) should the Authority deem that the submission is well founded, the Authority shall
aa) take measures defined under Article 56 and Article 57;
ab) close the investigation and launch a data protection procedure in accordance with Article 60, or
ac) close the investigation and launch a procedure for the supervision of classified data in accordance with Article 62;
b) close the investigation should it deem that the submission is unfounded.

(2) The Authority shall notify the reporting person of the results of the investigation, and of the reasons for closing the investigation and launching administrative proceedings."

Art. 61 (1):
"(1) In the decision made in the data protection procedure, the Authority may
a) order the correction of unauthentic personal data;
b) order the blocking, deletion or destruction of illegally controlled personal data;
c) prohibit the illegal control or processing of the personal data;
d) prohibit the transfer or delivery of the personal data to other countries;
e) order the notification of the data subject, should the data controller have unlawfully refused it, and
f) impose a fine."

Art. 56 and 579
"(1) Should the Authority establish the violation of rights relating to the control of personal data, access to data of public interest or data public on grounds of public interest, or the immediate threat of it, it shall call on the data controller to remedy it or eliminate the immediate threat.

(2) The data controller – in case of agreement – shall immediately take the necessary measures in the notification specified in paragraph (1) and shall notify the Authority of the measures taken, or – in case of disagreement – shall inform the Authority of their position in writing within thirty days of the receipt of the notification.

(3) In the case of data control authorities with supervisory bodies, the Authority shall make recommendations to the supervisory body of the data control body, notifying the data control body at the same time, should the notification issued in accordance with paragraph (1) have proved ineffective. Should the supervisory body of the data control body have not been notified in accordance with paragraph (1), the Authority may also directly make recommendations, if, in their view, these recommendations would effectively remedy the violation of rights or eliminate the immediate threat of it.

(4) The supervisory body shall notify the Authority in writing of their position in respect of the recommendation, as well as of the measures taken, within a period of thirty days following the receipt of the recommendation."

Ad para. 45.
The draft opinion has expressed concerns with regard to Art. 15 (5) of the Act that regulates the right to access – the right to request information on the processed personal data.
The aim of Art. 15 (5) primarily is to provide for the data subject the right to access the personal data processed by the data controller. The legislator however had to limit this right in order to prevent its abusive exercise that may harm legitimate interests of the data controller.

[8] Hungary regrets that in the English version of the Act an error has been made, the deadline dealing with the applicant's request to the Authority to conduct an investigation is two *months* (not two *days* as mentioned in the English version) according to the Act in force.
[9] The text of Art. 57 was cited above.

Therefore the provision stipulates that the exercise of the right of access is free of charge once a year, however, if the data subject wishes to request for information covering the same categories of processed personal data repeatedly, the data controller shall respond to these requests accordingly, and it may require the data subject to reimburse the costs10 incurred by the data controller due to the respond to the request.
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n this respect two aspects shall be underlined. On the one hand the reimbursement of costs cannot exceed the amount of costs de facto incurred with regard to the respond of the request for information, on the other hand the provision explicitly stipulates that the costs paid by the data subject "must be reimbursed if the data were controlled unlawfully, or if the request for information has lead to correction of the data". Hence it is obvious that the exercise of the right of access is guaranteed in the Act without any limitation on the number of requests the data subject is entitled to make and without requiring excessive expense to be paid by the data subject, still taking into due account the legitimate interests of the data controller.

Hungary believes that the explanation of Art. 15 (5) provides for further clarification of the provision and therefore the Venice Commission will find it in line with the European standards.

Ad para. 46.
Hungary recognises that the aim and application of Art. 17 (1) of the Act needs to be clarified.

Art. 17 (1) reads as follows:
"The controller shall correct the personal data if the personal data is not authentic and the data controller has access to the authentic personal data."
The provision obliges the data controller to rectify the personal data in case it is notified by either the data subject or the source of the data (e.g. another data controller) that the personal data processed is inaccurate.

The phrase "and the data controller has access to the authentic personal data" refers to the case where although the data controller was notified that the processed data is inaccurate it has no information on what is the correct personal data, hence it cannot rectify it accordingly. Apart from this, Hungary wishes to draw the attention to Art. 4 (4) that explicitly stipulates that "[t]he accuracy, integrity and – if required for the purpose of the data control – actuality of the data has to be ensured during the course of the data control, the data subject should only be identifiable for the time required for the purpose of the data control".
It stems from these assumptions that the data controller is obliged to rectify personal data subject to the condition it is able to do so.

Ad para. 47.
The Venice Commission in the draft opinion has expressed an additional concern with regard to the right of access as it is enshrined in the Act and suggested amending it in order to „limit data subjects' access so that they will not be allowed to know the source of the information made public by the journalists".

This concern is also reflected in the conclusions of the draft opinion.
Hungary is pleased to inform the Venice Commission that the suggested amendment is unnecessary as it already forms part of and is applicable in the Hungarian legal system.

[10] The English text of the Act, on which the draft opinion was based, might be slightly different from the Hungarian version as in the English version instead of "reimbursement of costs" the phrase "fee" can be found. Hungary regrets the misunderstanding stemming from the divergent meaning of the phrases in the different linguistic versions.

Art. 6 of Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content reads as follows:
"(1) A media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider shall be entitled, as stipulated by the respective Act, to keep the identity of a person delivering information to him/her in connection with the media content provider's activities (hereinafter as: journalists' source) in the course of court or regulatory procedures, as well as to refuse to hand over any document, object or data carriers that could potentially reveal the identity of the journalists' source.

(2) In order to investigate a crime, the court has the right – in exceptionally justified cases as defined by law – to oblige the media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of the journalists' source or to hand over any document, object, or data carrier that could potentially identify the journalists' source."

This Article is aimed at the protection of the source of information of journalists. According to these provisions the journalist is entitled to keep the identity of the source even in the course of court or regulatory (administrative) proceedings and only the court – subject to very stringent conditions – has the right to oblige the journalist to reveal the identity of the journalists'source.

In the Hungarian legal system Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content, especially the cited provisions shall be applied as lex specialis compared with Act CXII of 2011.

That involves logically the exercise of the right of access by the data subject, as well. It seems obvious that if the journalist is entitled to keep the identity of the source of information in course of legal proceedings, it also has the right not to reveal the source's identity to the data subject.

Nevertheless Hungary would like to underline that without prejudice to Art. 6 of Act CIV of 2010 the right of access as enshrined in Art. 15 (1) of Act CXII of 2011 shall be guaranteed. That means that the data controller – albeit a journalist – shall respond to the request of the data subject providing every details of the data processing with the exception of the unravelling of the identity of the source of information.

Hungary therefore is convinced that the protection of the source of information made public by journalists as it is guaranteed in the Hungarian legal system is in full conformity with the European standards.

D. The access to data of public interest

Ad para. 52.
Hungary regrets the fact that the Venice Commission, due to a misinterpretation of the provisions of the Act, has come to an obviously erroneous conclusion that the "personal data are excluded from the right to information".

On the contrary to the findings of the draft opinion the phrase „public data on ground of public interest" also covers personal data that are made public by virtue of a legal provision. Moreover, the term „public data on ground of public interest" was developed originally by the case-law of the Constitutional Court for the very reason to cover personal data and is usually applied in this context. Although as a general rule the principles of the protection of personal data exclude the publication of personal data, a number of acts explicitly make personal data accessible on ground of public interest (e.g. name and office of civil servants and other persons exercising public functions) in cases where the public interest regarding access to these information overweigh the interest of data subject to protect its personal data.

The definition of "public data on ground of public interest" and the provisions of the Act11 are meant to make it clear that once an act qualifies personal data as public data on ground of public interest they shall be made accessible the same way as data of public interest. It is worth mentioning that the Act itself regulates that certain personal data shall be public, thus shall be regarded as public data on ground of public interest.

Thus the balance of the right to protection of personal data and the right to access public information is made in the Hungarian legal system by the Parliament on a case-by-case basis and enshrined always in an act explicitly.

Ad para. 53.
In the light of the above explanation it is important to emphasize that the transparency of personal data can hardly be considered „very limited" taking into account the Hungarian legal system as a whole – that obviously could not be covered by the draft opinion restricted to deal with the Act CXII only.

There is a large number of statutory obligations in acts on various subject matters that are meant to provide access to certain personal data to the public. Nonetheless Art. 6 of Act CXII. itself makes several exceptions to the protection of personal data providing access to these data. In general, consent of the data subject and statutory obligations are the most typical ways enabling for the access to personal data, but grounds in Art. 6 may also be invoked in this context.12

Ad para. 54.
The rules of access to data of public interest do not allow the exclusion of personal data from public information as it is stated in the draft opinion, right on the contrary, the benefits granted by the public administration to staff is covered by Art. 26 (2) („name of the person acting on behalf of the body performing public tasks, as well as […] other personal data [emphasis added] relevant to the performance of public tasks […] qualify as data public on grounds of public interest").

Data concerning benefits provided by the institutions of the public administration to a third party are not only accessible upon a request but Annex 1 part III points 3-8 of the Act even stipulate that these data shall be published periodically.13

Ad para. 57.
The draft opinion calls for a clarification of the notions „data subject" and „personal data" stating that these are defined in „somewhat circular way".
In Hungary's view, these definitions are identical with the ones enshrined in Art. 2 (a) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data with the only difference of describing the two notions in two separate provisions for reasons of clarity. There has been no sign insofar of these definitions being insufficiently clear or causing difficulties of application in the Hungarian jurisdiction.

Ad. para. 58.
As the draft opinion stated Hungary also finds it indispensable to find the right balance between the protection of personal data and transparency. This is the very reason of introducing the notion „data public on grounds of public interests" which covers data that are not per se public on the ground of their nature but are made public by virtue of law on grounds of public interest. These data are generally personal data made accessible by legal provisions or data of non-state organisations made accessible the same way. However, the draft opinion observes well that data public on grounds of public interest are treated the same way as data of public interest.

[11] Art. 28 (1) of the Act.
[12] See in particular the „public appearance" clause in Art. 6 (7).
[13] See also Art. 37 (1).

Ad para. 59.
As para. 51. the draft opinion welcomed the inclusion of private stakeholders carrying out public duties, it seems to be unnecessary if not restrictive to include in the Act a definition of „public authorities" according to the Convention 205 instead of the more general term „body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation" (point 5 of Art. 3 of the Act). This latter general definition is also in line with the declaration made by Hungary with regard to Art. 1 (2) of the Convention 20514.

The definition of „official documents" in the Convention 205 is also duly covered by the first part of the definition of data of public interest: „information or data other than personal data registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation"15.

Ad para. 64.
The Hungarian legal terminology usually refrains from unnecessary textual duplications, therefore if a provision contains a list of notions or cases, the list is considered to be exhaustive. This is also the case if a provision does not expressively refer to the exhaustive nature of the provision with the word „only" or „exclusively". Moreover, non-exhaustive lists are always introduced with the expression „in particular".

Therefore Hungary is of the opinion that the provision listing the grounds for restriction of access to information in Art. 27 is undoubtedly of an exhaustive nature.
Similarly, the expression „by law" is also clear in Hungarian, reference to the same law itself is expressed by the term „this law".

This means that – as the draft opinion recognises correctly – the restrictions of access to information can be based only on a provision of an additional law but only on the grounds listed in Art. 27 of the Act itself.

Ad para. 66.
The draft opinion suggests adding the rules of access to classified information to the Act CXII of 2011.

Hungary wishes to draw the attention to the fact that the Hungarian legal system has chosen a different way to ensure the right balance between transparency and the interests of national defence and domestic security.

Act CLV of 2009 on the protection of classified information regulates not only the conditions and procedure for access to classified data but also the conditions and procedure of classification. Art. 2 (1) of Act CLV of 2009 is explicitly based on the principle of necessity and proportionality, i. e. the access to public information may only be restricted by classification of data if the conditions laid down in that law16 are met and the level of classification is not higher and the duration of classification is not longer than it is inevitably necessary.

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[14] Declaration handed over by the Minister for Justice and Law Enforcement of Hungary to the Deputy Secretary General of the Council of Europe at the time of signature of the instrument, on 18 June 2009, and confirmed in the instrument of ratification deposited on 5 January 2010:
"In accordance with Article 1, paragraph 2, subparagraph a.ii, of the Convention, the Republic of Hungary informs the Secretary General of the Council of Europe that, for the Republic of Hungary, the definition of "public authorities" includes the following:
– legislative bodies as regards their other activities;
– judicial authorities as regards their other activities;
– natural or legal persons insofar as they perform public functions or operate with public funds, according to national law."

[15] Point 5 of Art 3. of the Act.

[16] The referred provisions are in line with the exception in Act CXII of 2011 concerning national defence and domestic security.

In the light of the above, the unambiguous relationship between rules on transparency and rules on classified information is established in the Hungarian legal system.
It is also worth mentioning that the choice of two legal instruments instead of a single act on these two subject matters is considered to be a legal tradition in Hungary that is supported also by practical reasons, i.e. different parliamentary quorum is needed for the adoption of the provisions of the two acts.

However, Act CXII of 2011 regulates the Authority's right to launch a procedure for the supervision of classified data. Since the Authority has the right to access classified data, this procedure enables a more efficient way of challenging the classification than the one suggested in the draft opinion. Needless to say it seems to be difficult if not impossible to claim the unlawfulness of the classification of a piece of information, without knowing the classified data itself.

Ad para. 67.
Since the exception concerning legal or administrative proceedings is established – in line with the referred provision of the Act – in codes of administrative, civil and criminal procedures, the limitation of this exception shall be dealt with in these legal acts.

Ad para. 68.
As indicated above the Act provides only the legitimate grounds for restricting the right to access to data, the restriction itself shall be defined in separate legal norms. Therefore the clarification required by the draft opinion is unnecessary in the Act, as the detailed rules of application of the exception belong to acts concerning intellectual property issues. Nevertheless it is worth mentioning that Art. 83 (3) of the Civil Code also contains rules in this respect17.

Ad para. 69.
As the draft opinion itself states, the Act allows free access to data of public interest and allows a fee to be charged only in the case of copying the documents containing the requested data, and only to the extent of the actual costs incurred. Since the operation of bodies performing public tasks is governed by law, if the applicable rules do not allow explicitly to charge fees for an action, it is free of charge in any case. Moreover, Art. 33 (1) of the Act explicitly orders the electronic disclosure of data of public interest to be free of charge.

Ad para. 70.
Art. 27 (1) of the Act uses the term "may (…) be restricted by law (emphasis added)". Therefore, not the data-controlling body but the legislator shall decide upon the necessity of the restriction. The data-controlling body has to fulfil its obligations as prescribed by law. If the law denies access to certain categories of data on the grounds listed in the Act, the request to access these data shall also be rejected, but if there is no such legal restriction, the data-controlling body has no discretion, it has to allow access to the data concerned.

Art. 30 (5) of the Act applies only to cases where the legislator provides the data controller with an additional ground for discretion. In such cases the data controller is entitled to decide to allow access to data that are not available to the public in situations where the public interest for transparency overweighs the public interest to keep these data. This system enables the due consideration of the conflicting interests not only – and not mainly – for the data controller but during the course of legislation as well.

[17] „(3) Any data that is related to the central budget; the budget of a local government; the appropriation of moneys received from the European Communities; any subsidies and allowances in which the budget is involved; the management, control, use and appropriation and encumbrance of central and local government assets; and the acquisition of any rights in connection with such assets shall not be deemed business secrets, nor shall any data that specific other legislation, in the public interest, prescribes as public information. **Such publication, however, shall not include any data pertaining to technological procedures, technical solutions, manufacturing processes, work organization, logistical methods or know-how that, if made public, would be unreasonably detrimental for the business operation to which it is related, provided that withholding such information shall not interfere with the publication of public information in the public interest**."

Ad para. 72.

In Hungary's view, the relationship between Art. 27 (5) and (6) can be interpreted without any difficulties.

Art. 27 (5) regulates the disclosure of data generated or registrated during the course of decision-making process before the decision. On the contrary, Art. 27 (6) applies only to cases where the decision was made but the period of ten years from the generation of the data has not expired.

The core element of the provisions is their step-by-step application: while prior to the decision a balance of interests test, after the decision a more stringent harm-test shall be performed, and upon the expiration of a period of ten years from the generation of the data, there is no further legitimate ground for restriction, the data must be disclosed without any further consideration.

Ad para. 74.
The draft opinion suggests regulating the access to highly sensitive documents and business secrets in the Act for reasons of clarity.
Due to the fact that the procedure of classification of data and the rules of access to these data (not only for the public but also to members of state organs) compose already a complex system, Hungary finds it unnecessary to merge the two set of rules in a single act.

The subject matter of business secrets is regulated in the Civil Code. Since Hungary's new Civil Code is currently negotiated in the Parliament, it is not decided yet, in which act these provisions will be regulated. Hungary warmly welcomes the advice of the Venice Commission in this respect and will take it into due account.

Ad para. 79.
Hungary regrets that according to the English version of the Act on which the draft opinion is based it is not entirely clear that according to Art. 31 (1) the applicants may turn to the court in case their request for access to public information has been rejected. This concern of the Venice Commission is also stated in the conclusions of the draft opinion.
As the draft opinion recognised correctly this "shortcoming" is occurred by a sheer textual omission in the English translation of the text.
Hungary would like to underline that the Hungarian version18 – applicable in Hungary – explicitly grants refusal of access to public information as a ground for judicial review.

Ad para. 80.
The Venice Commission suggests in the draft opinion to clarify the remedial mechanism provided by the Act with regard to the access to public information both by drafting the two existing options in a single provision and to make the relationship between the two options unambiguous.

Although Hungary welcomes any recommendations that might improve the application of the Act, it considers that the amendment of the Act suggested by the Commission is not indispensable for the following reasons.

The position of the two provisions granting remedies for applicants endeavouring to access to public information stems from the structure of the Act. As the procedure of the Authority is

[18] The text of the Hungarian version of the Act currently in force reads as follows (the text marked with bold characters refers to the right of the applicants to seek judicial remedy in case their request for access to public information has been refused).
„31. § (1) Az igénylő **a közérdekű adat megismerésére vonatkozó igény elutasítása** vagy a teljesítésre nyitva álló, vagy az adatkezelő által a 29. § (2) bekezdése szerint meghosszabbított határidő eredménytelen eltelte **esetén**, valamint – ha a költségtérítést nem fizette meg – a másolat készítéséért megállapított költségtérítés összegének felülvizsgálata érdekében **bírósághoz fordulhat**."

drafted in an individual chapter of the Act, and due to the fact that this procedure applies for both the alleged violations of the protection of personal data and the right to access public information, it is logical to regulate this remedial option provided by the Authority in this chapter.

As for the relationship between the two remedial options at the disposal of the applicants,

Art. 31 (3) provides for an unambiguous explanation also recognised by the Venice Commission in para. 77. of the draft opinion.

Art. 31 (3) reads as follows:
"Litigation must be launched against the body performing public tasks within a period of thirty days following the announcement of the rejection of the request, the expiry of the deadline without result and the expiry of the deadline set for paying the fee charged. Should the applicant request an investigation of the Authority due to the rejection of the request, its non-fulfilment or the fee charged for making a copy and the applicant, litigation can be initiated within a period of thirty days following the receipt of the notification on the refusal of substantive assessment of the request for investigation, termination of the investigation, its closure pursuant to point b) of Article 55 (1) or notification specified in Article 58 (3). Missing the deadline to launch the proceedings can be justified."

Hungary expresses its hope that the explanations and comments above can reveal all the aspects of the system linked to the right to protection of personal data and the right to access public information that were mentioned in the draft opinion and invites the Venice Commission to take into due account these explanations and comments in the course of drafting its final opinion on the Act.